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VIA ECFS

Marlene H. Dortch
Secretary
Federal Communications Commission
445 12th Street, SW
Washington, DC 20554

Re: *Implementation of Section 621(a) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Protection and Competition Act of 1992*, MB Docket No. 05-311.

Dear Ms. Dortch:

NCTA – The Internet & Television Association files this letter in follow up to a meeting that representatives from NCTA, Comcast, Charter, and Cox had with Media Bureau staff on April 20, 2018 to discuss remand issues arising out of the Sixth Circuit's decision in *Montgomery County v. FCC*, 863 F.3d 485 (6th Cir. 2017).[1] As discussed at that meeting and shown below, the Commission has clear legal bases for reaffirming the mixed-use rule as applied to incumbent cable operators that also provide telecommunications services, reinstating it for all other incumbent operators, and clarifying the scope of the rule to preclude the imposition of duplicate fees and authorizations. Such action is necessary to promote a level playing field and facilitate the deployment of advanced cable infrastructure for broadband and 5G.

In the *First Section 621 Order*,[2] the FCC clarified that, under the Cable Act, local franchising authority ("LFA") "jurisdiction applies only to the provision of cable services over cable systems. To the extent a cable operator provides non-cable services and/or operates facilities that do not qualify as a cable system, it is unreasonable for an LFA to refuse to award a franchise based on issues related to such services or facilities."[3] Under this "mixed-use rule," an

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1 *See* Letter from Rick Chessen, NCTA, to Marlene H. Dortch, FCC, MB Dkt. No. 05-311 (Apr. 20, 2018).

2 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992*, Report and Order and Further Notice of Proposed Rulemaking, 22 FCC Rcd. 5101 (2007) ("*First Section 621 Order*").

3 *Id.* ¶ 121.

LFA "may not use its video franchising authority to attempt to regulate a LEC's entire network beyond the provision of cable services."[4]

The Commission predicated the mixed-use rule on the common carrier exception to the definition of cable system. That definition excludes "a facility of a common carrier which is subject, in whole or in part, to the provisions of subchapter II of this chapter," except to the extent the facility is used in the transmission of video programming directly to subscribers.[5] When the Commission extended the mixed-use rule to incumbent cable operators, it did not cite any other statutory basis for doing so.[6]

In reviewing the mixed-use rule on appeal, the Sixth Circuit reasoned that "many incumbent cable operators are not Title II carriers."[7] In the absence of any other statutory explanation, the court vacated the Commission's application of the rule to all incumbent operators, holding that the rule only applied to cable operators that are also common carriers.[8] However, the court invited the Commission to "set forth a valid statutory basis, if there is one," for the broader application of the rule.[9]

As a threshold matter, the Commission should reaffirm that the mixed use rule continues to apply to cable operators that offer Title II services.[10] As detailed below, however, the Commission also has ample authority under Title VI and other provisions of the Communications Act to apply the mixed-use rule to all incumbent cable operators. The Cable Act provides that "[a]ny franchising authority *may not regulate the services, facilities, and equipment provided by a cable operator* except to the extent consistent with this subchapter [*i.e.*,

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4 *Id.* ¶ 122.

5 *See* 47 U.S.C. § 522(7)(C); *First Section 621 Order* ¶ 122.

6 *Implementation of Section 621(a)(1) of the Cable Communications Policy Act of 1984 as amended by the Cable Television Consumer Protection and Competition Act of 1992,* Second Report and Order, 22 FCC Rcd. 19633 ¶¶ 16-17 (2007)

7 *Montgomery County*, 863 F.3d at 493.

8 *See id.* ("[T]he FCC's extension of the mixed-use rule to incumbent cable providers *that are not common carriers* is arbitrary and capricious.") (emphasis added). Notably, the common carrier exception to the definition of cable system is not limited to incumbent local exchange carriers, but rather applies to "a facility of a common carrier which is subject, in whole *or in part*, to the provisions of subchapter II," except to the extent such facility is used in the transmission of video programming directly to subscribers. 47 U.S.C. § 522(7)(C) (emphasis added).

9 *Montgomery County*, 863 F.3d at 493.

10 *Id.* at 493 (vacating mixed-use rule as applied to incumbent cable operators that are not common carriers). Many cable operators provide telecommunications services on a common carrier basis. The D.C. Circuit held that various certificated cable CLEC entities were "'telecommunications carriers' within the meaning of the Act," *Verizon Cal., Inc. v. FCC*, 555 F.3d 270, 275 (D.C. Cir. 2009) (rejecting challenge to telecommunications carrier status of cable-affiliated CLECs based on evidence that they held state certificates of public convenience and necessity, entered into interconnection agreements with incumbent LECs, and held themselves out as common carriers). In the recent *Business Data Services* proceeding, some operators also documented their offering of particular services on a common carrier basis. *See, e.g.*, Comments of Comcast Corp., WC Docket No. 16-143, at 15-17 (filed June 28, 2016) (explaining that certain of Comcast's BDS offerings are private carrier services, whereas others are offered on a common carrier basis).

the Cable Act]."[11] It then provides that "*any* provision of law of any State, political subdivision, or agency thereof, or franchising authority . . . which is inconsistent with this [Act] shall be deemed to be preempted and superseded."[12] Congress provided the Commission with multiple bases for limiting LFA authority to the provision of cable services. The same mixed use rule must apply to all cable operators, not only under express Title VI directives but under the reasoning of the *First Section 621 Order* and longstanding federal policies.

First, Section 621(a)(2) grants franchised cable operators the right to construct and operate a cable system in the public rights-of-way ("ROW").[13] Congress, the Commission, and courts have consistently held that a cable system remains a "cable system" under Section 602(7), even when used to provide non-cable services, such as information services.[14] Thus, delivering

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[11] 47 U.S.C. § 544(a) (emphasis added).

[12] 47 U.S.C. § 556(c) (emphasis added). As a matter of statutory public policy, preemption may not be contracted around or waived. *See, e.g., Cablevision Sys. Corp. v. Town of East Hampton*, 862 F. Supp. 875 (E.D.N.Y. 1994); *City of Dubuque v. Group W Cable*, No. C-85-1046, 1986 WL 15646, at *2 (N.D. Iowa June 18, 1986) ("[W]hile the Act confers a statutory right on the [cable operator], that right directly affects the public and may not be waived or released if such a waiver contravenes the statutory policy."); *City of Dubuque v. Group W Cable*, No. C-85-1046, 1986 WL 11826 (N.D. Iowa Feb. 25, 1987); *City of Burlington v. Mountain Cable Co.*, Dkt. S1190-86CnC (Vt. Superior Ct. Dec. 31, 1986) ("[P]reemption . . . extends to any state common law or contract which might impair the stated national objectives and policy."), *aff'd*, 559 A.2d 153, 165 (Vt. 1988) ("Here, the stated public policy is clear and unequivocal, and the enforcement of the contract provision would undermine and detract from that policy."), *cert. denied*, 492 U.S. 919 (1989); *accord Implementation of Sections of the Cable Television Consumer Protection and Competition Act of 1992*, First Order on Reconsideration, 9 FCC Rcd. 1164 n.105 (1993) ("An agreement to regulate rates in a manner inconsistent with Commission rules is, in any event, squarely prohibited by Section 623(a)(3)(A)."); *Amendment of Parts 1, 63, and 76 of the Commission's Rules to Implement the Provisions of the Cable Communications Policy Act of 1984*, Report and Order, 58 R.R.2d 35 n.91(1985) ("Neither a cable operator nor a franchising authority may waive mandatory sections of the Cable Act"); *Town of Norwood v. Adams-Russell Co.*, 549 N.E.2d 1115 (Mass. 1990) (contractual provisions cannot prevail over rate regulation provisions of Cable Act). While most of these "waiver" cases have concerned rate regulation, the principle that they advance extends far beyond rate regulation. *See, e.g., Cable TV Fund 14-A, Ltd. v. City of Naperville*, No. 96 C 5962, 1997 U.S. Dist. LEXIS 11511, at *86 (N.D. Ill. July 25, 1997) ("[T]he five percent cap on franchise fees provided in Section 542(b) of the Cable Act may not be waived.").

[13] *See* 47 U.S.C. §§ 541(a)(2), 522(9).

[14] *See, e.g.*, H.R. Rep. No. 98-934, at 22, 24 (1984), *as reprinted in* 1984 U.S.C.C.A.N. 4655, 4659, 4661; *Heritage Cablevision Associates of Dallas, L.P. v. Tex. Utilities Electric Co.*, Memorandum Opinion and Order, 6 FCC Rcd. 7099 ¶ 24 (1991), *aff'd*, *Tex. Utils. Elec. Co. v. FCC*, 997 F.2d 925 (D.C. Cir. 1993); *Nat'l Cable & Telecomms. Ass'n v. Gulf Power Co.*, 534 U.S. 327, 333 (2002); *see also* 47 U.S.C. § 521(4) (the Cable Act is intended to "assure that cable communications provide and are encouraged to provide the widest possible diversity of information sources and services to the public"). Section 624(e) further promotes innovative uses of cable systems. *See* 47 U.S.C. § 544(e). As amended in 1996, that provision prohibits local governments from limiting the use of particular transmission technologies or subscriber equipment, in order to avoid "the patchwork of regulations that would result from a locality-by-locality approach," which would be "particularly inappropriate in today's intensely dynamic technological environment." H.R. Rep. No. 104-204, at 110 (1995), *as reprinted in* 1996 U.S.C.C.A.N. 11, 78. As one Congressman put it: "Under this bill, the market, not the government, is going to tell us what the next wave of technology is." 141 Cong. Rec. H8294 (Aug. 2, 1995) (statement of Rep. White). In implementing the 1996 amendments, the Commission determined that Congress intended to allow cable systems to deploy wired and wireless facilities of their own choosing, and that "local authorities may not control whether a cable operator uses . . . coaxial cable, fiber optic cable, or microwave radio facilities." *Implementation of Cable Act Reform Provisions of the Telecommunications Act of 1996*,

non-cable services over a cable system is within the scope of the rights that Congress intended a cable franchise to grant, and LFAs may not impose additional burdens on the provision of non-cable services over a franchised cable system.

Second, Section 624(b) provides that, in any franchise granted after 1984, an LFA "may not … establish requirements for video programming *or other information services*." 47 U.S.C. § 544(b)(1) (emphasis added). When the Commission first classified cable modem services as information services in its 2002 *Cable Modem Declaratory Ruling*, it adhered to this statutory text in tentatively concluding that "[o]nce a cable operator has obtained a franchise for [constructing and operating a cable system over public rights of way]," the legal classification of Internet access service "should not affect the right of cable operators to access rights-of-way as necessary to provide cable modem service or to use their previously franchised systems to provide cable modem service."[15] When the Commission temporarily reclassified cable modem service as a telecommunications service, it reached the same conclusion that if a cable operator holds an existing cable franchise, then it is authorized to offer additional services, including Internet access; that is, the classification of Internet access as a telecommunications service should not serve as any "justification for a state or local franchising authority to require a party with a franchise to operate a 'cable system' . . . to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services."[16] Many courts have likewise affirmed that providers with Title VI cable franchises are authorized to provide such non-cable services without additional franchise or fee payments to LFAs.[17]

Third, Section 621(b)(3)(A) prohibits an LFA from imposing any requirement for telecommunications services as part of a cable franchise under Title VI. Section 621(b)(3)(B) similarly precludes an LFA from imposing any requirement "that has the purpose or effect of prohibiting, limiting, restricting or conditioning the provision of a telecommunications service by a cable operator. . . ."[18] And Section 621(b)(3)(D) states that an LFA "may not require a cable

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Report and Order, 14 FCC Rcd. 5296 ¶ 141 (1999).

15 *Inquiry Concerning High-Speed Access to Internet Over Cable and Other Facilities*, Declaratory Ruling and Notice of Proposed Rulemaking, 17 FCC Rcd. 4798 ¶ 102 (2002) ("*Cable Modem Declaratory Ruling*").

16 *Protecting and Promoting the Open Internet*, Report and Order on Remand, Declaratory Ruling, and Order, 30 FCC Rcd. 5601 ¶ 433 n.1285 (2015) ("*Title II Order*").

17 *E.g.*, *Comcast Cable of Plano, Inc. v. City of Plano*, 315 S.W.3d 673 (Tex. Ct. App. 2010); *City of Chicago v. Comcast Cable Holdings, L.L.C.*, 900 N.E.2d 256 (Ill. 2008); *City of Minneapolis v. Time Warner Cable, Inc.*, No. CIV. 05-994 ADM/ADB, 2005 WL 3036645 (D. Minn. Nov. 10, 2005); *Parish of Jefferson v. Cox Commc'ns La., LLC*, No. CIV. A. 02-3344, 2003 WL 21634440 (E.D. La. July 3, 2003).

18 47 U.S.C. § 541(b)(3)(A), (b)(3)(B). Section 621(b)(3)(C) further provides that a franchising authority may not order a cable operator or affiliate to discontinue the provision of a telecommunications service for lack of a franchise for telecommunications services. As the Ninth Circuit explained in discussing the City of Portland's attempt to regulate AT&T's "@Home" broadband/cable modem service: "*The Communications Act includes cable broadband transmission as one of the 'telecommunications services' a cable operator may provide over its cable system. Thus, AT&T need not obtain a franchise to offer cable broadband*, *see* 47 U.S.C. § 541(b)(3)(A); Portland may not impose any requirement that has 'the purpose or effect of prohibiting, limiting, restricting or conditioning' AT&T's provision of cable broadband, *see* 47 U.S.C. § 541(b)(3)(B); [and] Portland may not order AT&T to discontinue cable broadband, *see* 47 U.S.C. § 541(b)(3)(C)." *AT&T Corp. v. City of*

operator to provide any telecommunications service or facilities . . . as a condition of the initial grant of a franchise, a franchise renewal, or a transfer of a franchise."[19] As one court has explained, the 1996 Telecommunications Act reflects a clear federal policy "that market competition, rather than state or local regulations, would primarily determine which companies would provide the telecommunications services demanded by consumers. To carry out this goal, Congress adopted sweeping restrictions on the authority of state and local governments to limit the ability of telecommunications companies to do business in local markets."[20]

Fourth, Section 622 reinforces the Commission's authority to prohibit LFAs from imposing unwarranted and duplicative fees on franchised cable operators that offer non-cable services over their cable systems. In the 1996 Act, Congress amended Section 622 to cap the amount of compensation that LFAs can require for use of the public ROW to 5% of the cable operator's revenues from "cable services," rather than from its use of the cable system. This cap includes any "franchise fees paid by a cable operator with respect to any cable system" and covers "any tax, fee, or assessment of any kind."[21] Congress added this limitation to promote the use of cable systems for the provision of non-cable services without additional fees or burdens imposed by LFAs.[22] The Commission is specifically charged with "the *ultimate* responsibility for ensuring" such franchise fee limits, which have clear national policy ramifications.[23] It should make clear that the mixed use rule not only limits LFA regulatory authority to the provision of cable services, but that it also precludes the imposition of franchise fees on non-cable services.

The *First Section 621 Order* sets forth other legal and policy reasons why franchised cable systems should be free of additional local regulatory burdens for the provision of non-cable services. For example, the Commission determined that:

- "LFAs' jurisdiction applies only to the provision of cable services over cable systems,"[24] and does not permit the imposition of additional obligations or conditions

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Portland, 216 F.3d 871, 878-79 (9th Cir 2000), *overruled on other grounds by Nat'l Cable & Telecomms. Ass'n v. Brand X Internet Servs.*, 545 U.S. 967 (2005) (emphasis added).

19 47 U.S.C. § 541(b)(3)(D).

20 *Bell Atlantic-Md., Inc. v. Prince George's Cty.*, 49 F. Supp. 2d 805, 813 (D. Md. 1999) (internal citation omitted), *vacated on other grounds*, 212 F.3d 863 (4th Cir. 2000).

21 47 U.S.C. §§ 542(b), 542(g)(1).

22 *E.g.*, *Comcast Cable of Plano, Inc.*, 315 S.W.3d at 680 ("We conclude that § 542(b) unambiguously prohibits the City from charging Comcast any franchise fee on revenues generated from services that are furnished over its cable system and are not 'cable services.'"); *City of Chicago*, 900 N.E.2d 256; *City of Minneapolis*, 2005 WL 3036645; *Parish of Jefferson*, 2003 WL 21634440.

23 *See ACLU v. FCC*, 823 F.2d 1554, 1574 (D.C. Cir. 1987) (holding that the FCC has "the *ultimate* responsibility for ensuring a 'national policy' with respect to franchise fees") (emphasis in original); *City of Arlington v. FCC*, 569 U.S. 290, 307 (2013) ("It suffices to decide this case that the preconditions to deference under *Chevron* are satisfied because Congress has unambiguously vested the FCC with general authority to administer the Communications Act through rulemaking and adjudication."); *Alliance for Cmty. Media v. FCC*, 529 F.3d 763 (6th Cir. 2008) (interpreting Section 622).

24 *First Section 621 Order* ¶ 121.

on a telco's provision of non-cable services. This commonsense jurisdictional boundary is appropriate regardless of whether the provider is a new entrant or an incumbent operator, a common carrier or a provider of an unclassified new service.

- LFAs should not be allowed to require a telco with preexisting rights to access the public ROW to obtain a separate franchise solely for the purpose of upgrading its network.[25] By the same reasoning, a cable operator with preexisting public ROW access for its cable system network pursuant to a cable franchise should not be required to obtain a separate authorization to "upgrade" its network to provide non-cable services over the same facilities when Title VI already provides that authority, especially where there is no incremental burden on the ROW.[26]

Ensuring that cable operators – whether incumbents or new entrants – may use their cable systems to provide information and other non-cable services without additional local burdens, as Congress intended, is essential to competition.

Longstanding federal policies reinforce these conclusions. As the Commission has elsewhere recognized, treating like services alike promotes competition by allowing markets to determine the better operator rather than providing one with artificial regulatory advantages.[27] In this context, like treatment means applying the mixed use rule to all cable operators.

Finally, the Commission's reinstatement of the mixed-use rule to preclude all local regulation of non-cable service by LFAs, including the imposition of fees in addition to franchise fees, is fully consistent with longstanding federal deregulatory policies that apply regardless of whether such regulation and fees purport to be based on a locality's "video franchising authority"[28] under Title VI or on some other authority. Applying the mixed-use rule to all cable operators comports with the longstanding federal policy of non-regulation of information services.[29] Section 230(b) of the Communications Act and Section 706 of the 1996 Act embody

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[25] *Id.* ¶ 122.

[26] *See also Cable Modem Declaratory Ruling* ¶ 104 ("We are concerned that State or local regulation beyond that necessary to manage rights-of-way could impede competition and impose unnecessary delays and costs on the development of new broadband services."); *id.* ¶ 102 (tentatively concluding that "Title VI does not provide a basis for a local franchising authority to impose an additional franchise on a cable operator that provides cable modem service"); *Title II Order* ¶ 433 n.1285 (noting that the reclassification of broadband is not grounds to require a cable operator "to obtain an additional or modified franchise in connection with the provision of broadband Internet access service, or to pay any new franchising fees in connection with the provision of such services").

[27] *See, e.g.*, *Appropriate Framework for Broadband Access to the Internet over Wireline Facilities*, Report and Order and Notice of Proposed Rulemaking, 20 FCC Rcd. 14853 ¶¶ 17, 1 (2005) (recognizing the benefits of "crafting an analytical framework that is consistent, to the extent possible, across multiple platforms that support competing services," and accordingly adopting a framework that "regulat[es] like services in a similar functional manner").

[28] *See First Section 621 Order* ¶ 122.

[29] *See, e.g.*, *Restoring Internet Freedom*, Declaratory Ruling, Report and Order, and Order, FCC 17-166 ¶ 202 (2018) ("*RIF Order*") (describing "longstanding federal policy of nonregulation for information services" and the concomitant preemption of state regulation of such services); *Petition for Declaratory Ruling That Pulver.com's Free World Dialup Is Neither Telecommunications Nor a Telecommunications Service*,

the same congressional intent to reduce local barriers to competition and to promote the provision of information services.[30] In the *RIF Order*, the Commission reaffirmed the need for "a uniform set of federal regulations, rather than by a patchwork that includes separate state and local requirements,"[31] and expressly preempted any "entry and exit restrictions" – such as a requirement to obtain a franchise to provide broadband Internet access.[32]

Applying the mixed-use rule to all cable systems is also consistent with the longstanding federal policy of reducing local entry barriers for competitive telecommunications services.[33] Cable operators have experienced increased efforts by state and local governments to evade these federal policies and impose fees and conditions on the use of cable systems for non-cable services.[34] Congress clearly preempted franchising authorities from limiting, restricting or conditioning the provision of a telecommunications service over a Title VI cable system, and likewise sought to limit burdens on all telecom providers. But the statutory preemption of entry barriers is not limited to Title VI. Section 253(a) prohibits state or local governments from adopting any telecommunications service regulation that "materially inhibits or limits the ability of any competitor or potential competitor to compete in a fair and balanced regulatory environment."[35] Any such local regulation must be "competitively neutral and

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Memorandum Opinion and Order, 19 FCC Rcd. 3307 ¶ 16 (2004) ("[F]ederal authority has already been recognized as preeminent in the area of information services, and particularly in the area of the Internet and other interactive computer services, which Congress has explicitly stated should remain free of regulation.").

30 *See* 47 U.S.C. § 230(b) (stating that it is the policy of the United States to "promote the continued development of the Internet" and to "preserve the vibrant and *competitive free market* that presently exists for the Internet . . . *unfettered by Federal or State regulation*") (emphasis added); Telecommunications Act of 1996, Pub. L. No. 104-104, § 706, 110 Stat. 56, 153 (codified at 47 U.S.C. § 1302(a)) ("1996 Act") (directing the FCC to encourage the deployment on a reasonable and timely basis of broadband to all Americans by "remov[ing] barriers to infrastructure investment).

31 *RIF Order* ¶ 194.

32 *Id.* ¶ 195 & n.730.

33 *See* 47 U.S.C. § 253(a).

34 *See, e.g., City of Eugene v. Comcast of Or. II, Inc.*, 375 P.3d 446 (Or. 2016) (upholding the imposition of a telecommunications license fee on the provision of broadband over a franchised cable system). *But see, e.g., Capital Cities Cable, Inc. v. Crisp*, 467 U.S. 691, 708 (1984) ("[A]s we have repeatedly explained, when federal officials determine, as the FCC has here, that restrictive regulation of a particular area is not in the public interest, States are not permitted to use their police power to enact such a regulation." (internal quotation marks and citations omitted)); *City of Cincinnati v. Time Warner Cable, Inc.*, No. C-1-07-724, 2008 WL 11352596, at *4, 7 (S.D. Ohio July 1, 2008) (determining that Section 622(b) "clearly now provides that the franchise fee *on the entire system* cannot exceed five percent of the revenues derived from the provision of cable services only," and holding that the statute does not "permit the imposition of two franchise fees—one for cable services and one for non-cable services") (emphasis added); *City of Minneapolis*, 2005 WL 3036645, at *6 (holding that "a fee of virtually any kind targeting cable operators . . . is a franchise fee," and that "[c]ongressional intent is completely defeated if a franchising authority can simply cite to another federal law or state law as authority to charge what Congress forbids").

35 *See* 47 U.S.C. § 253(a); *California Payphone Association Petition for Preemption of Ordnance No. 576 NS of the City of Huntington Park, California Pursuant to Section 253(d) of the Communications Act of 1934*, Memorandum Opinion and Order, 12 FCC Rcd. 14191 ¶ 31 (1997); *Accelerating Wireline Broadband Deployment by Removing Barriers to Infrastructure Investment*, Notice of Proposed Rulemaking, Notice of Inquiry, and Request for Comment, 32 FCC Rcd. 3266 ¶ 108 (2017); *TCG N.Y., Inc. v. City of White Plains*,

nondiscriminatory," and limited to providing "fair and reasonable compensation" for the use of the public ROW.[36] Requiring further "compensation" from cable operators who already pay more than "fair and reasonable compensation" for their use of the public ROW in franchise fees, PEG access, institutional networks, and other obligations cannot be "fair and reasonable," or "competitively neutral and nondiscriminatory," particularly where the provision of new services has no incremental impact on the public ROW. Just as common carriers' non-cable services are off-limits to local franchising authorities, the same federal policies preclude all local regulation of cable systems' delivery of non-cable services.[37]

Please direct any questions to the undersigned.

Respectfully Submitted,

/s/ Rick Chessen

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305 F.3d 67, 76 (2d Cir. 2002).

[36] 47 U.S.C. §§ 253(c), (d); *TCG N.Y., Inc.*, 305 F.3d at 76-77.

[37] *See First Section 621 Order* ¶ 121-122.